

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CACR08-146

NIKSHEA S. TAYLOR

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** OCTOBER 1, 2008

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT  
[NO. CR-2004-877, CR-2004-878]

HONORABLE JAMES O. COX,  
JUDGE

AFFIRMED

**KAREN R. BAKER, Judge**

On December 8, 2004, appellant, Nikshea S. Taylor, entered a no-contest plea to leaving the scene of an accident and second-degree battery and was sentenced to six years suspended imposition of sentence. Appellant's suspended sentence was conditioned on payment of restitution and on compliance with federal, state, and municipal laws. On August 31, 2006, the State filed a petition to revoke or show cause, alleging that appellant had failed to pay restitution as ordered by the court. According to the petition, the current unpaid balance was \$12,656.13. The State later amended the petition to revoke or show cause to include the allegation that appellant had committed harassment in Sebastian County in violation of the terms and conditions of his suspended sentence. A hearing on the matter was held on October 3, 2007, at which the court found appellant had violated the terms of his release by not paying restitution and by committing the offense of harassment against Ashley

Feight. Appellant was sentenced to eighteen months' incarceration. Appellant now appeals and contends that the State failed to show that he violated the terms and conditions of his suspended sentence by a preponderance of the evidence. We affirm.

We have held that to revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of probation or suspended sentence by a preponderance of the evidence. *See* Ark. Code Ann. § 5-4-309(d) (Supp. 2001); *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002); *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001); *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). On appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Bradley, supra* (citing *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986)). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. *Id.* Thus, the burden on the State is not as great in a revocation hearing. *Id.* (citing *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992); *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (1980)). Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Bradley, supra.*

On appeal, appellant asserts that the State failed to show his failure to pay was willful. As a condition of his suspended sentence, appellant was required to make monthly payments of \$50 and to pay fines and costs after restitution had been paid. The State offered into evidence the restitution ledger and the fines and costs ledger in appellant's case. The

restitution ledger showed that as of October 3, 2007, appellant owed a past due amount of \$700. It showed that appellant made eight payments in 2005, two payments in 2006 (which included a \$300 bond forfeiture payment), and three payments in 2007. Both were admitted without objection. Once the State has introduced evidence of nonpayment, the burden of going forward shifted to the defendant to offer some reasonable excuse for his failure to pay. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). However, appellant offered no excuse for his delinquency, and the trial court noted that this was the second time appellant was brought before the court for arrearages. Because appellant did not object to the introduction of the ledgers and because he did not provide a reasonable excuse for his failure to pay, there was sufficient evidence to support the trial court's finding that appellant violated the conditions of his suspended sentence by failing to pay his restitution, fines, and costs.

Appellant also asserts that the State failed to prove that he committed the offense of harassment against Ashley Feight. A person commits harassment if with the purpose to harass, annoy, or alarm another person, without good cause, he or she engages in conduct or repeatedly commits an act that alarms or seriously annoys another person and that serves no legitimate purpose or places a person under surveillance by remaining present outside that person's residence. Ark. Code Ann. § 5-71-208(a)(5) and (6) (Repl. 2005). The testimony at the hearing showed that appellant repeatedly telephoned Ashley at home and while she was at work, often forty to sixty times a day. Appellant would beg Ashley to talk to him and had

even threatened to kill her. Appellant also drove past Ashley's home, sometimes twice a day. A neighbor testified that she witnessed appellant drive by Ashley's house and that she listened to the harassing messages appellant would leave on Ashley's voicemail. Appellant presented testimony from a friend, Shea Mobley, that she was the person responsible for making the calls to Ashley and not appellant. However, the trial court found Shea's testimony not credible and determined that her statements were "pure fabrication."

Because evidence that may not be sufficient to convict can be sufficient to revoke, due to the State's lower burden of proof in revocation cases, *see Newborn v. State*, 91 Ark. App. 318, 210 S.W.3d 153 (2005), the evidence presented supported a finding that appellant committed the offense of harassment. In addition, appellant failed to object to the State's introduction of the restitution and fines and costs ledgers, and appellant offered no reasonable excuse for his failure to pay. Therefore, there was sufficient evidence to support the trial court's finding that appellant violated the terms and conditions of his suspended sentence by committing the offense of harassment and failing to pay restitution, fines, and costs.

Affirmed.

GLOVER and VAUGHT, JJ., agree.